U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 January 2007*In the Matter of*

J.E.L.
Claimant
v.

PEABODY COAL COMPANY,
Employer

Case No. 2006-BLA-5183

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:[1]
J. E. L., Pro Se
Claimant
Philip J. Reverman, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER
DENIAL OF CLAIM

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Employer August 1, 2005. Director's Exhibit ("DX") 23.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

This is the second claim filed by the Claimant. An initial claim was filed June 30, 1994. DX 1. The District Director determined that the Claimant did not establish the existence of pneumoconiosis or of any of the medical issues. He did not appeal to the hearing level. That claim is administratively final.

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

The Claimant filed this subsequent claim on December 17, 2004. DX 3. A hearing was held in Owensboro Kentucky on September 27, 2006. 41 Director's Exhibits (DX 1-DX 41) were admitted into the record for identification. See transcript, "TR" 9. Three Claimant's Exhibits ("CX" 1- CX 3, TR 17) and two Employer's exhibits ("EX" 1 – EX 2, TR 35) were also admitted. The Claimant and his wife testified. I advised the Claimant and his wife that he has a right to be represented and offered to continue the case to let him get a representative, but he did not want me to continue the case.

Post hearing, I left the record open to give the Claimant and his wife an opportunity to produce additional evidence that may have included a biopsy report and a full report from William C. Houser, a treating medical provider. I reminded them that they continued to have a right to be represented and that they should speak to a lawyer. TR 39-41.

The Claimant is 65 years of age (DX 34) and has a ninth grade education, but can not read or write. During the hearing, I permitted his wife to help him. He has been married 47 years. He worked for Peabody Coal for 19 years. He left work in 1990 or 1991, when the mine closed. Id.18, 26. The last job he had for Peabody was shuttle car operator. Id. 26. After the mine closed, he drew unemployment insurance benefits for a time, and later he worked on coal trucks for Lara Stanley Trucking, where he did masonry. That work was not mine related, except once in a while when a truck would break down in the mines. Id. 21 -22, 26-27. He stopped working for Stanley when he had a heart attack. Id. 21, 28. He sees Dr. Gupta for cardiac problems.

Claimant filed a state claim and was treated by Dr. Houser for breathing problems. He uses two different breathing medications, but could not remember the names. At times he has to rest, even when he has not exerted very much. He tries to mow his yard and to walk a little. Id. 20, 23. He coughs and produces sputum. He has intermittent trouble sleeping.

He was awarded Social Security Disability benefits. At hearing he produced a mental status form and he is medicated for anxiety. Id. 9, 24. He testified that he was placed on disability due to his lungs and heart about 2000.

Employer's counsel read Nexium, Altace, Tricor, and Effexor from medications the Claimant brought with him into the record. Id. 30.

The Claimant's wife testified the Claimant takes Maxair and an unnamed inhaler for breathing problems. Id. 31. He takes them as needed. Dr. Selby performed a biopsy to determine whether the Claimant had lung cancer. It was negative, but the wife did not know whether pneumoconiosis was addressed. Id. 33.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989).

This case represents an initial claim for benefits. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of***

Utah, Inc., 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The timeliness of the claim is no longer being contested. TR 10.

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

I have reviewed all of the evidence in the record and no evidence exists to rebut the presumption.

2. The Claimant is a "miner" as that term is defined by the Act, and has worked after 1969. TR 10.

3. The Employer agreed that the Claimant had 19 years of coal mine employment. TR 10.

4. Peabody Coal Company is the responsible operator. TR 10.

5. The Claimant has one dependent. TR 10.

After a review of the stipulations and the record, they are accepted.

REMAINING ISSUES

1. Whether the miner suffers from pneumoconiois.
2. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled.
4. If so, whether the miner's disability is due to pneumoconiosis.

20 C.F.R. § 725.309: SUBSEQUENT CLAIMS

Any time within one year of a denial or award of benefits, any party to the proceeding may request a reconsideration based on a change in condition or a mistake of fact made during the determination of the claim; *See* 20 C.F.R. §725.310. Neither party made such a request.

However, after the expiration of one year, the submission of additional material or another claim is considered a subsequent claim which will be denied on the basis of the prior denial unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. § 725.309(d) (2001). Under this regulatory provision, according to the Court of Appeals for the Sixth Circuit in ***Sharondale Corp. v. Ross***, 42 F.3d 993, 997-998 (6th Circuit 1994):

> [T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change.

After proof of material change, I must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[2] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[3] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[4]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

CURRENT MEDICAL EVIDENCE SUMMARY

X-rays

Exhibit No.	Physician	BCR/BR	Date of film	Reading
CX 1	Houser		11/4/93	1,1
DX 15	Baker	B	1/14/05	0,1[5]
EX 1	Repsher	B	1/16/06	Negative

[2] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[3] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[4] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

[5] This x-ray was read for quality purposes only by Peter Barnett, M.D. a board certified B reader radiologist.

Pulmonary function studies

Exhibit No.	Physician	Date of study	Tracings present?	Flow-volume loop?	Broncho-dilator?	FEV1	FVC/ MVV	Coop. and Comp. Noted?
DX 15	Baker	1/14/15	Yes	Yes	No	2.77	3.20	
EX 1	Repsher	1/16/06	Yes	Yes	Yes	2.37 2.33	2.47 2.47	Poor

Blood gas studies

Exhibit No.	Physician	Date of Study	Altitude	Resting (R) Exercise (E)	PCO2	PO2	Comments
DX 15	Baker	1/14/05	0-2999	R	41	85	
EX 1	Repsher	1/16/06	0-2999	R	44.3	73	Mild Hypoxemia

Medical Reports

Glen Baker, M.D.

Dr. Baker, a Family Practitioner, conducted an examination of the Claimant on January 14, 2005 at the request of the Department of Labor. Although the chest x-ray taken as part of Dr. Baker's examination was found to be 0,1, "negative", for pneumoconiosis. DX 14, Dr. Baker found legal pneumoconiosis based upon physical findings, symptomotology, and pulmonary function testing . He found that the Claimant has a chronic lung disease caused by his coal mine employment.

Dr. Baker noted a mild restrictive ventilatoty defect and mild bronchitis, and a less than a 15-pack year history of smoking and a 24-year of alleged coal dust exposure, with 22 years being underground. A mild restrictive defect and borderline chest x-ray suggestive of pneumoconiosis, though a 0/1 on basis of 2000 ILO Classification not diagnostic is reported. Mild bronchitis is also reported. "These can all be caused by coal dust exposure. The coal dust exposure may be a significant factor and substantially aggravating to his current condition." He also stated that mild restrictive pulmonary defect, and mild bronchitis are significantly contributed to or substantially aggravated by dust exposure in the coal mine employment.

Dr. Baker opined that the Claimant has a class 2 pulmonary impairment, which is a 10 to 25% impairment of the whole person based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition. This has been primarily related to his pneumoconiosis as he has an epidemiologically and significant smoking history. He has only a class 2 impairment, which would be a 10 to 25% impairment of the person. His would be closer to 10% than 25%. He would have the respiratory capacity to do the work of a coal miner or comparable work in a dust-free environment.

This mild restrictive defect and mild bronchitis have a material adverse effect on the miner's respiratory condition but there is no pulmonary impairment. His condition is caused primary by coal dust exposure with minimal contribution from his cigarette smoking history. DX 15.

William C. Houser, M.D.

The Claimant submitted an x-ray and office notes and a cover letter from an attorney noting that Dr. Houser rendered an opinion that Claimant has pneumoconiosis. CX 1, CX 3.

Lawrence Repsher, M.D.

Dr. Repsher, board certified in internal and pulmonary medicine, took x-rays and a CT scan and performed spirometru and blood gasses on January 16, 2006. Both the x-ray and CT scan are reported negative. After testing, Dr. Repsher determined the following:

1. No evidence of medical or legal coal workers pneumoconiosis.
2. No evidence of any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment as a coal miner with exposure to coal mine dust.
3 Coronary artery disease, status post CABU, compensated, but active with continued angina pectoris.
4. Probable obstructive sleep apnea.
5. GERD.

He determined that the Claimant "is not now and never has suffered from either medical or legal coal workers pneumoconiosis or any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment with the Peabody Coal Co. with the inhalation of coal mine dust." His reasons for these opinions are as follows:

1. He has no radiographic evidence of CWP. His chest x-ray and CT scan show no rounded opacities consistent with medical CWP.
2. He has no histologic evidence of CWP. There are no lung biopsy slides for review.
3. He has no PFT evidence of CWP. His spirometry tests are uninterpretable, due to poor effort and cooperation. However, his relatively effort independent tests of lung volumes and diffusing capacity are normal.
4. He has no ABG evidence of CWP. His ABCs show only mild and nonqualifying hypoxemia, overwhelmingly most likely due to his serious coronary artery disease.
5. Since he has no objective evidence of any pulmonary impairment, clearly from a respiratory point of view, he is fully [it to perform his usual coal mine work or work of a similarly arduous nature in a different industry.

EX 1.

Gregory Fino, M.D.

Dr. Fino, also a board certified internist and pulmonologist, reviewed medical records for Employer. EX 2. Based upon his review of those records, Dr. Fino stated that Claimant has normal lung function and no evidence of pulmonary impairment.

He did note slight reductions in the FVC and FEV1 in 2005 compared to the previous values in 1994. He believed that this is related both to the aging process and the fact that Claimant had undergone coronary bypass surgery three years earlier. "Such surgery can produce a pleural reaction, and this can restrict lung expansion. The significant pleural reaction was, in fact, noted on the CT scan performed by Dr. Repsher. However, the values for the pulmonary function study on 1/14/05 do not show any impairment or disability that would prevent this man - from a respiratory standpoint - from performing his last job in the mines or a job requiring similar effort.

Dr. Fino opined that Dr. Repsher's spirometry is technically invalid. However, he determined that the normal lung volumes rule out pulmonary fibrosis causing restriction, and the normal diffusing capacity rules out any impairment in oxygen transfer.

His opinion is "from a respiratory standpoint, this man was not disabled in 1994 and he is not disabled in 2006. Therefore, there has been no material change in his pulmonary condition over that period of time."

Although the numeric decrease in his FVC and FEV1 between 1994 and 2005 was noted, Dr. Fino stated that this is of no clinical significance when it comes to impairment or disability. EX 2.

"Other" Medical Evidence

Exhibit No.	Physician	Date of Medical Report	Type of Procedure	Comments
EX 1	Repsher	1/16/06	CT	No pneumoconiosis.

FINDINGS OF FACT

Pneumoconiosis

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[6] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[7] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

The record I consider under the rules for limitations on evidence involves three readings of three x-rays. The Claimant relies on the one reading by Dr. Houser, who is not a B reader. CX 1. The other x-rays were read as negative.

The weight I must attribute to the x-rays submitted for evaluation with the current application is in dispute. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."

[6] 20 C.F.R § 718.201(a).
[7] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I note that of the readers of record, Dr. Repsher and Dr. Baker are both B readers and are the best qualified.

I note that the preponderance of the readers do not find pneumoconiosis.

The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, ***Wilt v. Wolverine Mining Co***., 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, ***Edmiston v. F & R Coal Co***., 14 B.L.R. 1-65 (1990). See also ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); ***Tokaricik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). See also ***Woodward v. Director, OWCP***, 991 F.2d 314 (6th Cir. 1993).

I also note that the most recent x-rays are negative. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. ***Clark v. Karst-;Robbins Coal Co.***, 12 B.L.R. 1-;149 (1989)(en banc); ***Casella v. Kaiser Steel Corp.***, 9 B.L.R. 1-;131 (1986).

In this case, the number of negative x-rays and expert opinion of the most qualified readers dictate a conclusion that pneumoconiosis has not been established by x-ray. This determination is substantiated by the fact that the most recent x-rays are negative.

Biopsy and Presumption

Although the Claimant and his wife testified that he had a biopsy and although I held the record open to accept biopsy evidence, Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

I note that the CT scan is negative, but I do not accord CT scans any significant weight as to legal pneumoconiosis.

"Legal pneumoconiosis is a much broader category of disease" than medical pneumoconiosis, which is "a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray." ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 at 210 (4th Cir. 2000). The burden is on the Claimant to prove that his coal-mine employment caused his lung disease. 20 C.F.R. § 718.201(a)(2). A disease "arising out of coal mine employment" is one

that is significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. § 718.201(b). ***Cornett v. Benham Coal, Inc***., 227 F.3d 569, 576 (6th Cir. 2000).

I do not find the reports of Dr. Houston are helpful as they are not really narrative reports and do not contain test results except for the x-ray. CX 1, CX 3.

Dr. Baker did not find clinical pneumoconiosis, but diagnosed legal coal workers' pneumoconiosis based upon pulmonary function tests, physical findings, spirometry, use of inhaler and the number of years in his occupational history, clinical findings and symptomotology of the Claimant. Dr. Baker noted a mild restrictive ventilatoty defect and mild bronchitis. He noted the smoking history. Although he noted that the influence of smoking and coal dust could not be determined as to the degree of influence, pneumoconiosis was attributed as the primary cause of the Claimant's lung condition.

Dr. Repsher, who examined the Claimant, found only mild and nonqualifying hypoxemia, overwhelmingly most likely due to his serious coronary artery disease.

Dr. Fino, who did not examine the Claimant render an opinion that there is no respiratory deficit established on testing in this record. He finds that the test giving rise to hypoxemia is invalid.

A 'reasoned' opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. ***Fields v. Island Creek Coal Co***., 10 B.L.R. 1-19 (1987). Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. ***Clark v. Karst-Robbins Coal Co***., 12 B.L.R. 1-149 (1989)(en banc).

In reviewing whether Dr. Baker submitted a well reasoned report, I note that whereas the Claimant alleged shortness of breath, wheezing, cough and mucus production, however, the physical examination did not show any pulmonary abnormalities. Specifically there were no rales, rhonchi, rubs or wheezes heard on examination of the lungs. There was no physical examination evidence of any type of lung condition. There were no other significant abnormalities on the physical examination.

There are no reliable office notes or hospital records to substantiate the symptoms. Dr. Repsher's examination did not note any positive findings consistent with pneumoconiosis.

However, Dr. Baker relies on the symptomology as a major premise of his logic without considering that none of it is substantiated.

The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. §718.202(a)(4) (2001). I find that Dr. failed to submit a "reasoned medical opinion" that establishes that legal pneumoconiosis is established in this record.

TOTAL DISABILITY

To receive black lung disability benefits under the Act, a claimant must establish total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204(b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204(b)(1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart

failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

The record does not contain sufficient evidence that Claimant has complicated pneumoconiosis and there is no evidence of cor pulmonale with right sided congestive heart failure. As a result, the Claimant must demonstrate total respiratory or pulmonary disability through pulmonary function tests, arterial blood-gas tests, or medical opinion.

Where total disability cannot be established by pulmonary functions studies, blood gas studies, or by evidence of cor pulmonale, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual or comparable coal mine employment. 20 C.F.R. §718.204(c)(4) (2000) and §718.204(b)(1).

None of the medical records and medical reports establish total respiratory disability. Even Dr. Baker did not find total respiratory disability

Therefore, I find that the Claimant has failed to establish it.

CAUSATION AND DUE TO PNEUMOCONIOSIS

Because the Claimant has failed to establish the existence of pneumoconiosis and total disability, these issues are moot.

CONCLUSION

In summary, the Claimant has not established the presence of pneumoconiosis. I find that the Claimant has failed to establish a required element of proof. ***Oggero v. Director, OWCP***, *supra.* As a result, because this is an initial claim, there is no need to evaluate the remainder of the issues. He has failed to prove that one of the applicable conditions of entitlement has changed since his prior claim became final. 20 CFR § 725.309(d). Therefore, his claim for benefits is denied.

ORDER

It is ordered that the claim of **J.E.L**. for benefits under the Black Lung Benefits Act is hereby **DENIED**.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington,

DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).